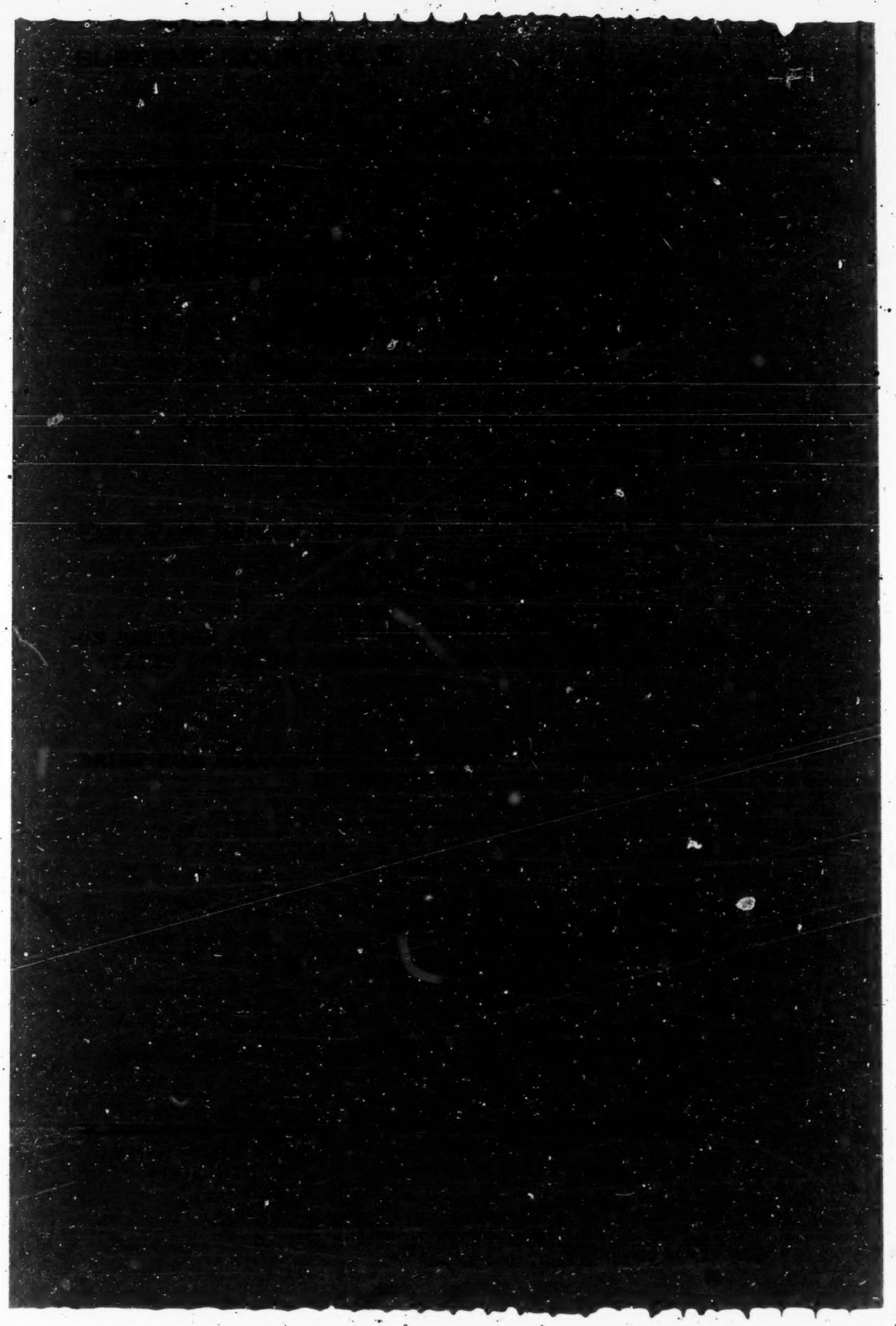

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 104

QUENTIN STROUD, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF AGRICULTURE, IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. C.A. App. 22-45)[1] is reported at 155 F. Supp. 482. The opinion of the court of appeals (Pet. App. 24-31) is reported at 254 F. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1958. The petition for a writ of certiorari

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[1] "Pet. C.A. App." designates petitioners' appendix in the court of appeals, "Pet. App." their appendix to the petition for a writ of certiorari. Respondents' appendix in the court of appeals is cited "Resp. App."

was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court was without jurisdiction to entertain this action on the ground that it lacked jurisdiction over the Secretary of Agriculture, an indispensable party.

2. Whether, under the Agricultural Act of 1949, the Secretary of Agriculture had the power to reduce the support price level applicable to three varieties of flue-cured tobacco, and to provide for their identification, when he determined that these varieties were undesirable and that their increasing production would threaten the stability of the industry and the price support program.

STATUTES INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 23-24.

STATEMENT

Petitioners are seventy-eight North Carolina tobacco producers who, last year, grew in their fields varieties of tobacco known as Coker 139, Coker 140 and Dixie Bright 244. They brought this action to challenge provisions of the 1957 tobacco price support program which established price support for these varieties at 50 percent of the support level for comparable grades of standard varieties of tobacco, and which provided a program for identification of tobaccos belonging to these varieties in the production stage and up to their sale on the warehouse floor. Special blue "limited sup-

port" marketing cards were issued to farmers producing the so-called "discount varieties"; and tobacco brought for sale on a blue card was identified at the auction warehouse by the use of special striped basket tickets.

Petitioners alleged that they grew their crop in good faith, from seed which had been represented to them as not containing the discount varieties (Pet. C.A. App. 12). They complained that the identification of their product removed it "from competitive bidding on the auction market" and compelled them to dispose of it for the 50 percent support price, allegedly less than one-third its actual cash value (Pet. C.A. App. 10-11). They charged that the discrimination between varieties was arbitrary and unauthorized by law (Pet. C.A. App. 8); that it was improperly established without notice, hearing or referendum (Pet. C.A. App. 8-9); that, in any event, it was not possible to determine varieties with accuracy (Pet. C.A. App. 13); and that contracts which implement the program violated the anti-trust laws (Pet. C.A. App. 19-20).

In their prayer for relief, petitioners sought a judgment declaring invalid the rules and regulations of the Secretary of Agriculture for inspection of tobacco, classification of discount varieties, issuance of special marketing cards and use of distinctive warehouse tickets; an order directing the Secretary, through co-defendants and others, to support petitioners' tobacco at 90 percent of parity and to discontinue enforcement of the invalid rules and regulations; and the recovery of damages (Pet. C.A. App. 15-16).

A. *The 1957 Tobacco Loan Program and Variety Identification.* While flue-cured tobacco is also grown

in a number of other countries, the United States' product is prized for its outstanding flavor and aroma and fetches from 25 percent to more than 100 percent above prices paid for the competing products of other countries (Resp. App. 15-16, 35-36, 45, 135). Normally, from one-third to one-half of the American flue-cured crop goes into the export trade; this constitutes 60 percent of the world's flue-cured export (Resp. App. 20-44, 133).

In 1955 and 1956, however, there were increasing complaints from domestic and foreign buyers that tobaccos purchased here lacked the customary, and desired, flavor and aroma. Representatives of the Department of Agriculture and of the trade heard repeated criticism of the quality of the American crop, and buyers reported instructions to avoid inferior tobacco, cancellation of orders, and, on at least one occasion, return of an export shipment (Resp. App. 17-20, 24-26, 41-42, 45, 69, 71-74, 82, 134, 137). These complaints were directed at three new varieties of tobacco being grown in the United States—Coker 139, Coker 140 and Dixie Bright 244 (Resp. App. 17, 74, 134). A variety evaluation committee convened by the Department of Agriculture in late 1956, and composed of leading tobacco scientists from colleges and experimental stations, designated these three varieties as "low to lacking in flavor and aroma, generally of light body, and/or currently with poor acceptance in the trade" (Resp. App. 76-77).

Despite these reactions, Coker 139, Coker 140 and Dixie Bright 244 increased from about 20 percent of the 1955 crop to 50-60 percent in 1956 (Resp. App. 68,

70).[2] In the auction warehouse, and at the rapid pace of auction sales (a basket every nine seconds), it was almost impossible for buyers to distinguish these undesirable varieties from the standard flue-cured tobaccos (Resp. App. 23, 43, 47, 136, 179, 192, 215, 221-222). Only later in their factories and essentially by smoking tests, did the purchasers discover the absence of the flavor and aroma (Resp. App. 29-31, 63-64, 135-137, 142-143). Increasing attempts by purchasers to avoid the undesirable varieties caused a hesitant caution in the 1956 markets and depressed prices (Resp. App. 25, 42, 138, 214-216, 221). As a result, the Stabilization Corporation took 320 million pounds, 22.49 percent of the 1956 crop, under price support (Pet. C.A. App. 34; Resp. App. 42, 70, 217).

As the district court here concluded, a repetition of the 1956 season would have been "disastrous, perhaps fatal, to the price support program" (Pet. C.A. App. 34; Resp. App. 97, 217-218). Unless action were taken, it was feared that 80 percent or more of the 1957 crop would have been in the discount varieties (Resp. App. 38, 54-55, 97). The resulting switch of foreign buyers to other sources of neutral tobacco would have meant the substantial loss of our export market within a few years, observers warned (Resp. App. 16, 19, 55, 137-138, 139).

Accordingly, in December 1956, the Department proposed to discourage the production of the three so-

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[2] Coker 139 and 140 came into substantial use in 1955, Dixie Bright 244 in 1956 (Resp. App. 223, 42). Their popularity was due to their resistance to disease and the high yield per acre (Resp. App. 76-77, 114-115, 129, 218). As one expert testified, "If it [Coker 139 and 140] had had flavor and aroma it was the answer to the growers' prayer" (Resp. App. 218).

called discount varieties by lowering their support price to one-half that of the standard varieties, a suggestion which obtained the almost unanimous approval of leaders of all branches of the tobacco trade.[3] Only Mr. Coker, the breeder of 139 and 140, his chemist, and two other persons from South Carolina opposed (Resp. App. 22, 77, 218). The contemplated reduction was officially announced by the Secretary on December 18, 1956 (Resp. App. 78; Exh. P-4), and notification was mailed to each flue-cured producer in the United States by about mid-January (Resp. App. 78, 207-208; Exh. D-8).

The Secretary's official announcement in December 1956 stated that, as a condition to eligibility and price support, growers would have to establish whether they grow any of the discount varieties (Exhs. P-4, D-8). The Department's plan to identify the tobacco in the field, and to issue special blue "limited support" marketing cards to designate crops of discount tobacco, was announced early in January 1957 (See Exh. P-5), was published as Proposed Rule Making in May (Par.

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[3] This followed an unsuccessful attempt to cope with the problem during the 1956 season through the machinery for grading tobacco by appearance and texture under the Tobacco Inspection Act, 7 U.S.C. 511, *et seq.* Nine additional grades were established to segregate the high color and pale, slick appearance thought to characterize the undesirable tobaccos; these were given 10 cents per pound less price support than the comparable previous grades (Resp. App. 69-70, 115-116, 130).

This attempt failed because, first, the 1956 production of discount tobaccos was so large that the graders could not make the necessary distinctions. (Resp. App. 70, 78.) Second, it became evident that discount tobacco could be produced with the appearance of standard tobacco and be indistinguishable under the Inspection Act standards (Resp. App. 74, 78). It was therefore necessary directly to designate these tobaccos by variety and to devise appropriate tests to identify them.

3, 22 F.R. 3201-3202) and adopted in detail in June 1957, as part of the 1957-1958 Tobacco Marketing Quota Regulations (Sections 725.835(f), 725.838(b)-(d), 725.852(b), 22 F.R. 4066-4068, 4071). The terms of the 1957 Tobacco Loan Program published on July 9, 1957, prescribed support of the discount varieties at one-half the rate for comparable grades of other varieties; the use of blue "limited support" marketing cards; and identification at the warehouse auction "by a distinguishably different type of basket ticket." 22 F.R. at 4777-4779. Tobacco auction warehouses were required by their contracts with the Flue-Cured Tobacco Cooperative Stabilization Corporation, which advances price supports, to place striped tickets upon baskets of tobacco sold on a blue marketing card and to offer the lower price support for such tobacco (Secs. 464.901, 464.910 of 1957 Tobacco Loan Program; 22 F.R. at 4777, 4779; Exhs. P-1, P-2; Resp. App. 227-229).

The actual identification of the discount varieties was based upon two facts. First, these varieties have distinguishable physical characteristics in the growing stage which makes it possible for a trained observer to identify them accurately in the field (Resp. App. 47, 48, 83-84, 86-87, 172-173, 176, 181, 187-189, 195, 221-222; Exh. P-15). Second, under similar conditions of soil, cultural practice and weather conditions, the discount varieties, as a genetic characteristic, have only about one-half the nicotine content of the standard varieties, a difference which can be measured in chemical tests (Resp. App. 1-4, 48, 87-88, 146-147, 150-151, 156, 163-164, 167; Pet. C.A. App. 81). Field and laboratory tests were conducted and from the results it was deter-

mined whether the particular grower would get a regular white marketing card, entitling him to the full support price, or a blue limited support card (Resp. App. 85, 163-164, 168, 200-201). Section 725.835(f) of 1957-1958 Marketing Quota Regulations, 22 F.R. at 4066-4067. The grower could demand a reexamination of his farm if a determination of discount varieties was made; if so, the tests were repeated (Resp. App. 85, 201; Exh. P-16).

The effect of the Department's program, as the court of appeals stated, was "swift and impressive" (Pet. App. 28). Due to the cooperation of all growers, only about one-half percent of the 1957 crop was in the discount varieties, as compared to 40-60 percent the previous year (Resp. App. 110, 114, 118, 139, 219). The renewed confidence of foreign and domestic buyers in the quality of the flue-cured crop was demonstrated by strong buying in the 1957 market at the highest prices ever and an unusually large proportion of export sales, 55 percent of the tobacco sold (Resp. App. 26, 44, 66, 109, 139, 220). At the time of trial, because of these improved market conditions only 3.67 percent of the auction tobacco was entering the price support pool as compared with nearly one-fourth of the crop of the year before (Pet. C.A. App. 34).

B. *The Decisions Below.* In its opinion, the district court first disposed of respondent's motion to dismiss the complaint on the ground, among others, that the court lacked jurisdiction over the Secretary of Agriculture and that it had no jurisdiction to entertain an action for mandamus. While admitting that these jurisdictional points "raised doubts" in his mind, Judge Gilliam denied the motion in the belief that it was "in the public interest to reach a consideration on the merits" (Pet. C.A. App. 23).

On the merits, Judge Gilliam sustained the program against all of the petitioners' contentions. He found that the program had been required to avert the "destructive effect" of the switch to discount tobaccos upon the price support program and the tobacco trade generally (Pet. C.A, App. 24-26). It was established, the court stated, that discount varieties could be distinguished by inspection and chemical analysis and that all aspects of the program complied with the statutory requirements and "were and are being carried out * * * at all levels in a fair and equitable manner" (Pet. C.A. App. 32-33).

On appeal, the Fourth Circuit reviewed the background and implementation of the discount variety program and its "dramatic" restoration of market confidence and stability (Pet. App. 24-28). The court did not, however, reach the merits but disposed of the case on jurisdictional grounds.

The court held, first, that the Secretary was not answerable in the district court in North Carolina since he could be sued only in the District of Columbia (Pet. App. 28). Furthermore, the action could not be maintained against the other defendants since the Secretary of Agriculture was an indispensable party. The court pointed out that the thrust of the action was "in actuality against the Secretary and his administrative regulations" (Pet. App. 30). It was particularly necessary that the Secretary or the United States be made a party since petitioners demanded a doubling of price support payments, which would require a disbursement of funds supplied by the United States (Pet. App. 39).

The court rejected the possibility that it might enjoin the use of distinctive basket tickets, apart from the other regulations. The tickets were only a detail in the

program and the effect of such order would be nullification of the regulations through a return to the chaotic conditions in 1955-1956, a rise in the volume of tobacco entering the stabilization pool and an increased burden on public funds (Pet. App. 31).

Accordingly, the court of appeals directed that the judgment be vacated and the case remanded to be dismissed for lack of jurisdiction, "without any intimation, however, that the merits were not correctly decided by the District Judge" (Pet. App. 31).

ARGUMENT

In holding that the district court was without jurisdiction to entertain an action challenging provisions of the 1957 price support program in the absence of the Secretary of Agriculture, the Fourth Circuit adhered to well established principles. Nevertheless, petitioners now state that they are entitled to relief against the remaining local officials (Pet. 12) and urge as the chief questions presented their contentions on the merits (Pet. 3-5). We submit that further review is not called for since the decision below was clearly correct; there are additional jurisdictional obstacles to the consideration of the instant action; and, in any event, petitioners' claims are entirely without merit.[4]

I.

A. It is well established that the Secretary of Agriculture can be sued in his official capacity only in

[4] In view of the fact that similar provisions for discount varieties will be included in the 1958 tobacco loan program, and presumably in future years, we pass over the fact that the 1957 program challenged in this action has long since been executed. The 1958-1959 Tobacco Marketing Quota Regulations published on June 12, 1958 contain provisions similar to those last year. 23 F.R. 4143, 4144-4147, 4150. See *supra*, pp. 6-7. The 1958 loan program will be published in the near future.

the District of Columbia, his official residence. Absent explicit statutory authorization, no effective service of process can be made within any other federal district and hence no other federal court can obtain jurisdiction over him. *Blackmar* v. *Guerre*, 342 U.S. 512, 516; *Butterworth* v. *Hill*, 114 U.S. 128; *Hunter* v. *United States*, 183 F. 2d 446 (C.A. 4); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C.A. 4), certiorari denied, 339 U.S. 949. Here, the Secretary was clearly an indispensable party to the action. The governing principle, set forth by this Court in *Williams* v. *Fanning*, 332 U.S. 490, is that the Department head is indispensable to the action "if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." 332 U.S. at 493. The tobacco price support program was undertaken under the terms of the Agricultural Act of 1949 which provides that "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary." Section 401(b), 7 U.S.C. 1421(b). The history of the program shows that the Secretary fully exercised these powers and was responsible for the reduced price support on Coker 139, Coker 140 and Dixie Bright 244, and for the variety identification plan. *Supra*, pp. 5-7; opinion of the district court, Pet. C.A. App. 43.[5]

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[5] The 1957-1958 Marketing Quota Regulations, establishing field identification of discount tobacco and special limited support cards (*supra*, pp. 6-7), were issued by the Acting Secretary of Agriculture. 22 F.R. at 4074. The loan program, specifying one-half support rate and the use of striped basket tickets, was published by the Executive Vice President of the Commodity Credit Corporation. (Continued)

Petitioners have never contested the Secretary's central position in agricultural price support programs. Indeed, their complaint refers throughout to the acts of the Secretary, through his co-defendants and others (Pet. C.A. App. 8, 9, 10, 11, 13, 15, 16). And the complaint explicitly sought relief against "the rules and regulations issued by the defendant, Secretary of Agriculture" (Pet. C.A. App. 12, 15).

Petitioners prayed for an end to the issuance of distinctive marketing cards covering discount varieties, and also for the payment of price support at twice the rates provided in the Department's schedule, equivalent to the rates for the standard varieties (Pet. C.A. App. 15-16). The disruptive impact of such relief is particularly evident with respect to the price support payments sought, which, as the Fourth Circuit noted, "can come only from moneys supplied by the United States" (Pet. App. 30). Price support funds are advanced to the tobacco cooperative associations by Commodity Credit Corporation in the form of nonrecourse loans. Resp. App. 67-68; Section 405 of Agricultural Act of 1949, 7 U.S.C. 1425; Section 464.901 of 1957 Tobacco Loan Program, 22 F.R. at 4777. And the disbursement of these funds as price supports to growers follows a carefully calculated

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22 F.R. at 4779. As the statutes require, Commodity Credit was acting under the direction of the Secretary and fulfilling a program established by him. Section 2 of Commodity Credit Corporation Charter Act, 15 U.S.C. 714; Section 401(a), (b) of Agricultural Act of 1949, 7 U.S.C. 1421 (a), (b).

The district court recognized that, as the record makes clear, the entire program was initiated by the Secretary. Pet. C.A. App. 43. Any other body was a mere "conduit" for the effectuation of the Secretary's decision (*Harris* v. *Bayer*, 18 F.R.D. 392, 393) and the Secretary was, therefore, indispensable to this action (*Williams* v. *Fanning*, 332 U.S. at 493).

schedule. The Department fixes rates each year for more than 150 grades of tobacco, adjusted for the discount varieties and for tied and untied tobacco, so that, considering the estimated crop per grade, the average support price level will be 90 percent of parity—in 1957, 50.8 cents per pound. Resp. App. 90-96, 118-132; Exhs. D-5, D-8. A direction that support prices be increased for the discount varieties might cause the Flue-Cured Association to sustain heavy losses upon sale of the tobacco, which would require additional payments by Commodity, putting the entire program in jeopardy (Pet. C.A. App. 34; Resp. App. 68). The witnesses predicted, and both courts below agreed, that a halt in the identification program would set in motion a repetition of the 1956 situation, market confidence would slump and prices drop, causing the disastrous effect then feared (Pet. App. 31; Pet. C.A. App. 34; Resp. App. 23, 28-29, 44-45, 55-56, 221, 224-225).

Thus, petitioners do not seek merely to correct details of the implementation of price supports, which might conceivably have been committed to local officials. Rather, they would reverse a broad program adopted under the Secretary's authority after deliberation and consultation with tobacco scientists and all branches of the tobacco trade. Such an action cannot be maintained except against the Secretary.[6]

[6] Injunctive suits against subordinate officials restraining official action have been permitted only upon two conditions, neither of which are present here: (1) that the official was unlawfully infringing upon private rights recognized by law; and (2) that an effective order can be made which will expend itself on the subordinate officials, without interfering with the public administration or impinging on the public treasury or domain. *Williams* v. *Fanning*, 332 U.S. at 493-494.

Here, however, the program challenged is not an invasion of private rights but a system of gratuitous benefits provided by Con-

Finally, it may be noted that, even if subordinate officials could be sued, none of the defendant officials here would be appropriate parties in a challenge to the price support and variety identification program. Determinations as to the existence of discount varieties on petitioners' farms were made by the County Agricultural Stabilization and Conservation Committees, as provided in Section 725.835(f) of 1957-1958 Marketing Quota Regulations, 22 F.R. at 4066-4067. Resp. App. 85, 163, 168, 200-201, 209.[7] Yet no county committee is party to this action. Petitioners have joined only the county managers, whose issuance of the blue cards was an automatic, purely ministerial, act following the committee's determination (Section 725.839(b), 22 F.R. at 4069; Resp. App. 209); and the State A.S.C. Committee, which employed the variety specialists (Resp. App. 199-200) but played no other part in the pertinent determination here (Resp. App. 85-86).

B. A further jurisdictional obstacle to the instant action, shown by respondent's motion in the district court and by our brief in the court of appeals, is that the action sought relief in the nature of mandamus, and

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gress. And the relief sought would disrupt the entire administration of tobacco price supports including utilization of public monies.

It should be noted that if the relief prayed would not merely cause eventual disbursement of Government funds, but would directly order such payments, it would constitute an action against the sovereign which would have to be brought against the United States; even joining the Secretary would be insufficient. *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371, 374-375; *Land* v *Dollar*, 330 U.S. 731, 738.

[7] The county committees are bodies elected by delegates of the growers themselves and must be farmers within the county. Section 8(b) of Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590h(b).

hence was beyond the power of the district court. The petitioners sought to compel the Secretary to take action (Pet. C.A. App. 15-16; *supra*, pp. 3, 12) and, in fact, styled the relief sought as "a mandatory order" (Pet. C.A. App. 14). As such, it was entirely beyond the power of the court in which this case was brought, since federal district courts outside the District of Columbia have no jurisdiction to entertain original actions for a writ of mandamus. *Covington & C. Bridge Co. v. Hager*, 203 U.S. 109; *Knapp* v. *Lake Shore Ry. Co.*, 197 U.S. 536; *Rosenbaum* v. *Bauer*, 120 U.S. 450; *Kendall* v. *United States*, 12 Pet. 524; *McIntire* v. *Wood*, 7 Cranch 504. The appellate court below has consistently rejected such attempts to compel the performance of official duties by Government officers. *Updegraff v. Talbott*, 221 F. 2d 342 (C.A. 4); *Hunter* v. *United States*, 183 F. 2d 49 (C.A. 4); *Krug* v. *Fox*, 161 F. 2d 1013, 1019-1020 (C.A. 4); *Branham* v. *Langley*, 139 F. 2d 115 (C.A. 4).

C. Moreover, petitioners had no standing to challenge the provisions of the 1957 price support program. This program imposed no obligations upon petitioners, who are not required to participate in it nor to offer their crop to the cooperative associations or to Commodity. It was not a violation of any rule or regulation to produce and market the discount varieties of tobacco (Resp. App. 111, 112, 208).

Price support benefits are gratuitously provided by Congress as a method of aiding the growers and stabilizing the market, and the action challenged here was the Secretary's exercise of the discretion vested in him by Congress in administering the allocation of these benefits. Since petitioners' expectation that they would

receive a certain level of benefits is not a legally protected interest, the adverse decision of the Secretary, acting wholly within his statutory power (*infra*, pp. 17-21), does not give them standing to sue. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 478-479; *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; see *Stark* v. *Wickard*, 321 U.S. 288, 304.

Furthermore, in the 1949 Agricultural Act, under which tobacco price supports are given, Congress plainly barred judicial review. Section 412, 7 U.S.C. 1429, provides that "Determinations made by the Secretary under this Act shall be final and conclusive * * *." Such a finality clause withdraws jurisdiction from the courts (*United States* v. *Babcock*, 250 U.S. 328, 331), and will be enforced without hesitation when it involves a gratuitous benefit that may be qualified or withdrawn by Congress. *Work* v. *Rives*, 267 U.S. 175, 181-182; cf. *Lynch* v. *United States*, 292 U.S. 571, 577; *Dismuke* v. *United States*, 297 U.S. 167, 172.

II

Because of the failure of jurisdiction in this case, the court of appeals did not reach the merits. However, in view of petitioners' presentation of the substantive issues as questions presented (Pet. 3-4), we shall briefly demonstrate that, as the district court held, there is no legal merit or equity to petitioners' case.

A. As the reason for granting the writ of certiorari, petitioners advert only to one of the substantive issues raised in their complaint—that, when the Secretary promulgated the discount variety aspect of the tobacco loan program, he failed to comply with the notice, hearing and referendum provided in the Agricultural

Marketing Agreement Act of 1937, 7 U.S.C. 608c(3), (8), (9); Pet. 10-11. The short answer is, as the district court held (Pet. C.A. App. 35-39), that the tobacco price support program is not an exercise of the Secretary's power under the Marketing Agreement Act but rather under the Agricultural Act of 1949 which authorizes price support for tobacco in Section 101(a), (c), 7 U.S.C. 1441(a), (c). The 1949 Act commits the administration and formulation of price support programs to the discretion of the Secretary and there is no requirement of notice, hearing or referendum. See Sections 401, 412, 7 U.S.C. 1421, 1429.[8]

B. Petitioners contend that, while different support levels may be fixed for the various grades of flue-cured tobacco, no distinction may be made according to varieties. See Pet. C.A. App. 6, 16. However, the statutory authorization is not so limited. Except as otherwise provided, the Secretary is to determine or approve "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out * * *." Section 401(b) of the Agri-

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[8] The district court suggested a reason for the different procedures in the Agricultural Marketing Agreement Act of 1937 and the Agricultural Act of 1949 (Pet. C.A. App. 36). While price supports do not impose any burden or risk upon growers, orders under the 1937 Act may limit quantities of a commodity to be sold and this severe restriction should not be undertaken without the opportunity for hearing nor without the approval of the trade, except in unusual circumstances.

Similarly, in enacting the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, Congress explicitly excepted from the prescribed rule-making procedures "any matter relating to * * * loans, grants, benefits, or contracts." Section 4. 92 Cong. Rec. 5650. And this exception has always been understood to exempt subsidy programs and loans by such agencies as the Commodity Credit Corporation from the A.P.A. procedures. See Attorney General's Manual on the Administrative Procedure Act (1947), p. 27.

cultural Act of 1949, 7 U.S.C. 1421 (b). And Section 403, 7 U.S.C. 1423, expressly provides:

> Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. * * *[9]

The Secretary had the power under Section 403 to reduce the price support levels for Coker 139, Coker 140 and Dixie Bright 244 because they were of lower "quality"; furthermore, their lack of flavor and aroma and the disfavor of the current market were clearly among the "other factors" upon which he was authorized to act.

It has always been understood that Section 403 gave the Secretary the widest discretion to consider any relevant factor as the basis for differentials in support levels. When the provisions of Section 403 were first adopted, in 1948, language which appeared to limit this discretion was struck out. See Hearings on Agricultural Act of 1948, Senate Committee on Agriculture

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[9] Section 403 continues:

> * * * Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. * * *

The evidence in this case established that the price support levels were calculated so that the average support price would equal 50.8 cents per pound, 90 percent of parity for 1957, after taking into consideration adjustments for the various grades, for the estimated crop of discount varieties and for the difference between tied and untied tobacco. This complied with the Act, as the district court held. See *supra*, pp. 12-13; Pet. C.A. App. 40.

and Forestry, 80th Cong., 2d Sess., p. 55.[10] With respect to tobacco there have long been different support levels for tied and untied tobacco, an element which affects cost of handling of the product (Resp. App. 119, 122-123), and in supporting other commodities, the Department has considered differences between varieties, giving reduced support to those determined to be undesirable in the current market.[11]

This wide range of support prices is necessary, as the district court pointed out, since "[w]ithout such 'demand value' differentiation there would be no incentive for the production of better quality, more desirable products." Pet. C.A. App. 40. Furthermore, since the purpose is to stabilize the market, it is entirely appropriate to take over tobaccos at loan rates which bear some relation to their long-range value (Resp.

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[10] The original Senate bill which proposed this section (S. 2318, 80th Cong., 2d Sess.) provided for adjustments "for differences in grade, type, staple, quality, and other factors, *to reflect historical differences in prices based on such factors.*" (Emphasis added.) Secretary of Agriculture Anderson told the Senate Committee that the provision was unnecessary since "these and other price differential factors" were always taken into consideration and "any practical program will continue to take account of them." He further objected to the italicized reference to historical differences, asserting that its emphasis on the past was "unduly confining." A price support operation, he stated, "must take account of conditions that will prevail during the year ahead." Hearings, *supra*.

The criticized portion of the section was dropped and the provision, now Section 403 of the 1949 Act, was adopted as an amendment to Section 302 of the Agricultural Adjustment Act of 1938. Section 202(a) of Agricultural Act of 1948, 62 Stat. 1245, 1254.

[11] Section 446.906(b)(5) of the 1957 Peanut Price Support Program, 22 F.R. at 6552; Section 446.806(b)(4) of the 1956 Peanut Price Support Program, 21 F.R. at 5983, reducing supports for Florispan peanuts. Section 421.2243(c) of 1957 Wheat Price Support Program, 22 F.R. at 2408; Section 421.1643(c), (d)(3) of the 1956 Wheat Price Support Program, 21 F.R. at 4003, 5565-5566, reducing support for more than twenty varieties of wheat.

App. 92, 119). In the instant case, the Secretary's discretion was exercised carefully and reasonably to discourage production of undesirable tobaccos and thereby to avert possible loss of our flue-cured export market, potential collapse of the price support program, and disastrous consequences for the entire trade.[12] Like the decision upon "questions of judgment requiring close analysis and nice choices" in the fixing of tolls, upheld recently (*Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318), the Secretary's allocation of price supports should not disturbed.

The Secretary's discretion was, in effect, reviewed and sustained by Congress last year. After the 1957 tobacco price support program was announced, Senator Johnston introduced Senate Bill 382 which would have amended Section 403 of the 1949 Act to bar the variety portion of the program by adding the following sentence:

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[12] Moreover, recognizing that many growers planted the discount varieties unintentionally last year, special provision was made in the 1957 program to minimize the loss to them from the reduction in price supports (Resp. App. 88):

Two special pools were set up by the Stabilization Corporation to handle the 4.5 million pounds of discount tobacco which came under price support—one for tobacco composed of less than one-third discount, a second for the remainder. This is being separately packed and merchandised in an effort to realize as much as possible, and the entire return above the support loan and actual cost of handling will be distributed to the growers as soon as possible (Resp. App. 51-52, 88-89, 114, 116-117, 228). Ordinarily, the growers get only one-half of the excess return and distribution is delayed until all the year's crop is disposed of (Resp. App. 51; Section 464.906(a)-(c) of 1957 Tobacco Loan Program, 22 F.R. at 4778).

Approximately two-thirds of this tobacco has been sold. Until the pools are entirely liquidated by the Stabilization Corporation, it will be impossible to determine what loss, if any, will be sustained by the petitioners.

> * * * Notwithstanding the foregoing provisions of this section, no such adjustments shall be made in the support price of tobacco for differences in variety.

The bill died in committee after hearings were held upon it. Hearings on S. 382, Support Price for Tobacco, Senate Committee on Agriculture and Forestry, 85th Cong., 1st Sess. (1957).

C. Petitioners' other contentions may be briefly answered. First, the use of a striped basket ticket for discount variety tobacco is not precluded by the Tobacco Inspection Act, 7 U.S.C. 511, *et seq.* It does not conflict with any of the grading information provided by that Act but simply adds to the ticket an additional symbol, wholly for price support purposes, and authorized under the Agricultural Act of 1949 (Pet. C.A. App. 41-42).

Furthermore, the antitrust laws do not constitute an obstacle to the variety identification program, since the specific authority of a federal regulatory act suffices to exclude such official action from the scope of antitrust policy. See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91-93; *Parker* v. *Brown*, 317 U.S. 341, 350-352; *United States* v. *Borden Co.*, 308 U.S. 188, 201-202; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 558, 560; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 193 F. 2d 230, 234-235 (C.A.D.C.), affirmed, 343 U.S. 414. This allegation comes with poor grace from the petitioners for, as the district court found, the relief sought here would enable them to engage in one of the oldest forms of unfair trade practices and pass their

product off as one of the more desirable standard varieties of tobacco (Pet. C.A. App. 33, 42, 44).

And, finally, there is no basis for the contention that the Secretary's administration of the agricultural price support program deprived petitioners of property without due process of law. Restrictive regulation in the agricultural field has been sustained (*e.g.*, *Mulford* v. *Smith*, 307 U.S. 38, 49-51; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 148-151); a discretionary distribution of price support benefits is valid *a fortiori*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY, 1958.

APPENDIX

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U.S.C. 1421, *et seq.*, are as follows:

Section 101 (7 U.S.C. 1441).

The Secretary of Agriculture (hereinafter called the "Secretary") is authorized and directed to make available through loans, purchases, or other operations, price support to cooperators for any crop of any basic agricultural commodity, if producers have not disapproved marketing quotas for such crop, at a level not in excess of 90 per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c) as follows:

* * * * *

(c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price.

* * * * *

Section 401 (7 U.S.C. 1421).

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

Section 403 (7 U.S.C. 1423).

Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. * * *

Section 405 (7 U.S.C. 1425).

No producer shall be personally liable for any deficiency arising from the sale of the collateral securing any loan made under authority of this Act unless such loan was obtained through fraudulent representations by the producer. This provision shall not, however, be construed to prevent the Commodity Credit Corporation or the Secretary from requiring producers to assume liability for deficiences in the grade, quality, or quantity of commodities stored on the farm or delivered by them, for failure properly to care for and preserve commodities, or for failure or refusal to deliver commodities in accordance with the requirements of the program.

Section 412 (7 U.S.C. 1429).

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

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